

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

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March 18, 2005

Perry A. Brown

IBEW Local Union 477

955 West Jefferson Avenue

San Bernardino, CA 92410

Re: Public Works Case No. 2004-024  
New Mitsubishi Auto Dealership  
Victorville Redevelopment Agency

Dear Mr. Brown:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of the new Mitsubishi automobile sales and service facility ("Project") in the City of Victorville ("City") is not a public work subject to the payment of prevailing wages.

Factual Background

In February 2002, the Victorville Redevelopment Agency ("Agency") and Bakhtiari, LLC ("Developer") entered into a Disposition and Development Agreement ("DDA") for the construction of the Project on Valley Center Drive in City to be operated by the Safari Auto Corporation.<sup>1</sup> In the DDA, Developer agreed to purchase the land from Agency for \$1,124,007.<sup>2</sup> Also in the DDA Agency agreed to provide Developer the following benefits to induce and facilitate the development of the Project:

<sup>1</sup> Agency's counsel represents that Safari Auto Corporation and Bakhtiari, LLC have the same interlocking ownership. Safari Auto Corporation is the entity that holds the Mitsubishi dealership franchise, and it owns and operates the dealership. The other entity, Bakhtiari, LLC, was formed by the Safari Auto Corporation's owners to purchase the real estate for the Project and to build the new facility for the dealership.

<sup>2</sup> The purchase price was based on an independent appraisal report prepared for Agency by a state-certified real estate appraiser. In the face of the credible appraisal and absent a contrary credible appraisal, this determination assumes a fair market transaction in the property conveyance. PW 2003-040, Sierra Business Park/City of Fontana (January 23, 2004). No party to this public works coverage request disputes the purchase price represents the fair market price of the parcel under Labor Code section 1720(b)(3). If evidence is produced that differs from the facts presented to the Director, including but not limited to proof that the purchase price of the land was set at less than fair market value, a different determination might be made with respect to publicworks coverage.

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1. Agency's subdivision of its property prior to Developer's purchase of the Project site, at no cost to Developer and at a cost of \$710 to Agency.
2. A one-year waiver of the monthly advertising fees that Agency would otherwise charge Developer for advertising Developer's business on Agency's electronic reader board adjacent to the Project. This waiver would amount to a subsidy of \$23,940.
3. Reimbursement of a maximum of \$75,000 to Developer for certain relocation costs related to the move of the dealership from the former site to the Project site.

In April 2001, prior to the drafting of the DDA, the Safari Auto Corporation had entered into an "incubator lease" with City, the purpose of which was to induce Safari Auto Corporation to immediately commence business in City while awaiting completion of the Project. Under this lease, the new Mitsubishi dealership was initially opened on the premises of an old Toyota dealership on Amargosa Road in Victorville. Under the incubator lease for the Amargosa Road facility, City agreed to accept rent at the below-market rate of \$2,000 per month. Since the fair market rental rate was stated to be \$6,000 per month, the discounted rent amounted to a savings of \$48,000 until the Project could be completed and the dealership could be relocated. Under the lease agreement, the full rental amount would have been due and owing only in the event that Developer and Agency failed to enter into a DDA within the first year of the lease.

Developer has recently disclaimed any right to the advertising fee waiver. Developer has also informed Agency that it would not apply for any more than \$65,000 in the form of relocation reimbursement.

The overall Project costs amounted to approximately \$4,010,000. Except for the above benefits that may be public funds, the Project was otherwise privately funded by Developer.

#### Applicable Law

Labor Code section 1720(a)(1)<sup>3</sup> generally defines public works to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... "

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<sup>3</sup> All further statutory references are to the Labor Code unless otherwise specified.

When the DDA was executed in 2002, what was then Section 1720(b) defined the term "paid for in whole or in part out of public funds" as "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than the fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations."

Section 1720(c)(3) provides that, notwithstanding subdivision (b): "If the state or political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is *de minimis* in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter."

#### Analysis

It is not disputed that the Project involved construction done under contract. The issues presented are whether the above-enumerated Agency contributions constitute the payment of public funds and, if so, whether the Project nevertheless is exempt from prevailing wage requirements under the exemption provided in Section 1720(c)(3).

The Amargosa Road premises were leased to Developer under an incubator lease entered into in 2001, before Section 1720(b) was amended to include in the definition of public funds rent charged at less than fair market value, waived or forgiven. *McIntosh v. Aubry* (1993) 14 Cal.App.4<sup>th</sup> 1576, 18 Cal.Rptr.2d 680 held that rent forbearance did not constitute the payment of public funds. This was the applicable law when the parties executed the incubator lease. As such, while the rent charged by City to Developer under the incubator lease was admittedly below fair market value, it did not constitute payment of public funds at the time the lease was entered into.

Even if Agency's payment of the subdivision fee and its reimbursement to Developer of the relocation costs constitute payment of public funds for construction, at an aggregate cost of \$65,710 these Agency contributions represent only 1.64 percent of the total Project cost of \$4,010,000. Under these facts, such an amount can reasonably be considered *de minimis* in the context of

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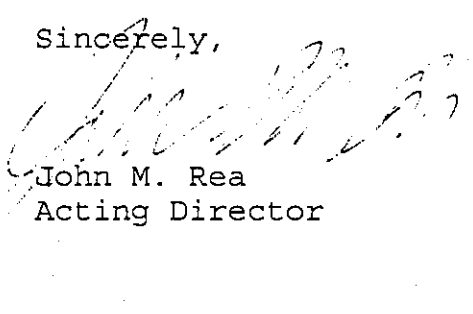
the overall Project cost. In other words, the public funding was proportionately small enough, in relation to the overall cost of the Project, that the availability of those funds did not significantly affect the economic viability of the Project.<sup>4</sup> Under Section 1720(c)(3), because Agency is providing a public subsidy to Developer that is *de minimis* in the context of the Project, the Project is exempt from prevailing wage requirements.

### Conclusion

For the reasons discussed herein, the subsidies provided by Agency to the Project do not convert this otherwise privately financed Project into a public work requiring the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea  
Acting Director

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<sup>4</sup> Nothing in the prevailing wage law or the legislative history of Section 1720(c)(3) provides guidance as to the appropriate measure of what should be considered *de minimis*. Because of this, the Department has sought guidance by referring to other statutory or regulatory schemes to see how the term "*de minimis*" is defined for other State agencies. See, for example, the definition followed by the Franchise Tax Board at California Code of Regulations, title 18, section 19141.6(k)(3) (taxpayer's failure to provide records will be considered *de minimis* when those records are deemed "not to have significant or sufficient value in the determination of the correctness of the tax treatment ..."). See also the *de minimis* standard set forth at Public Resources Code section 30514(d)(1) for the California Coastal Commission (local coastal plan amendments may be considered *de minimis* when "a proposed amendment would have no impact, either individually or cumulatively, on coastal resources ... " and the "amendment does not propose any change in land use or water uses, or any change in the allowable use of the property.").